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TEXAS  
COMMISSION  
ON ENVIRONMENTAL  
QUALITY  
Blas J. Coy, Jr., *Public Interest Counsel*

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

*Protecting Texas by Reducing and Preventing Pollution*

March 3, 2014

2014 MAR -3 PM 3:36  
CHIEF CLERKS OFFICE

Bridget Bohac, Chief Clerk  
Texas Commission on Environmental Quality  
Office of the Chief Clerk (MC-105)  
P.O. Box 13087  
Austin, Texas 78711-3087

RE: **ALGONQUIN WATER RESOURCES OF TEXAS, LLC**  
**TCEQ DOCKET NO. 2013-2138-MWD**

Dear Ms. Bohac:

Enclosed for filing is the Office of Public Interest Counsel's Response to Requests for Hearing in the above-entitled matter.

Sincerely,

A handwritten signature in cursive script that reads "Aaron Tucker".

Aaron Tucker, Attorney  
Assistant Public Interest Counsel

cc: Mailing List

Enclosure

1. The first part of the document is a letter from the President of the United States to the Congress, dated January 1, 1861. It is a very important document, as it sets out the President's policy for the new year. The President states that he is pleased to see the Congress assembled, and that he is confident that the country is in a good position to meet the challenges of the future.

2. The second part of the document is a report from the Secretary of the Treasury, dated January 1, 1861. It is a very important document, as it sets out the Secretary's policy for the new year. The Secretary states that he is pleased to see the Congress assembled, and that he is confident that the country is in a good position to meet the challenges of the future.

3. The third part of the document is a report from the Secretary of the Interior, dated January 1, 1861. It is a very important document, as it sets out the Secretary's policy for the new year. The Secretary states that he is pleased to see the Congress assembled, and that he is confident that the country is in a good position to meet the challenges of the future.

4. The fourth part of the document is a report from the Secretary of the Navy, dated January 1, 1861. It is a very important document, as it sets out the Secretary's policy for the new year. The Secretary states that he is pleased to see the Congress assembled, and that he is confident that the country is in a good position to meet the challenges of the future.

5. The fifth part of the document is a report from the Secretary of the War, dated January 1, 1861. It is a very important document, as it sets out the Secretary's policy for the new year. The Secretary states that he is pleased to see the Congress assembled, and that he is confident that the country is in a good position to meet the challenges of the future.

6. The sixth part of the document is a report from the Secretary of the State, dated January 1, 1861. It is a very important document, as it sets out the Secretary's policy for the new year. The Secretary states that he is pleased to see the Congress assembled, and that he is confident that the country is in a good position to meet the challenges of the future.

**TCEQ DOCKET NO. 2013-2138-MWD**

**IN THE MATTER OF  
THE APPLICATION OF  
ALGONQUIN WATER  
RESOURCES OF  
TEXAS, LLC FOR  
TPDES PERMIT NO.  
WQ0013849001**

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**BEFORE THE TEXAS  
COMMISSION ON  
ENVIRONMENTAL  
QUALITY**

**THE OFFICE OF PUBLIC INTEREST COUNSEL'S RESPONSE TO REQUESTS  
FOR HEARING**

The Office of Public Interest Counsel (OPIC) of the Texas Commission on Environmental Quality (Commission or TCEQ) files this Response to Requests for Hearing in the above-referenced matter and respectfully shows the following.

**I. INTRODUCTION**

**a. Background of Facility**

Applicant Algonquin Water Resources of Texas, LLC has applied to the TCEQ for a major permit amendment to Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0013849001 to authorize a change in the method of effluent disposal from irrigation to discharge into waters of the state. The current permit authorizes the disposal of treated domestic wastewater at a daily average flow not to exceed 200,000 gallons per day via surface irrigation system with a minimum area of 72 acres of non-public access grass land. The facility is located approximately 1,250 feet northwest of the intersection of State Highway 155 and Farm-to Market Road 2661 in Smith County, Texas 75762.

If the draft permit is issued, the treated effluent will be discharged to an unnamed tributary of Rose Branch; thence to Rose Branch; thence to Lake Palestine in Segment

No. 0605 of the Neches River Basin. The unclassified receiving water uses are no significant aquatic life use for the unnamed tributary of Rose Branch and high aquatic life use for Rose Branch. The designated uses for Segment No. 0605 are high aquatic life use, public water supply and primary contact recreation. In accordance with 30 TEX. ADMIN. CODE § 307.5 and the TCEQ implementation procedures (January 2003) for the Texas Surface Water Quality Standards, an antidegradation review of the receiving waters was performed. A Tier 1 antidegradation review has preliminarily determined that existing water quality uses will not be impaired by this permit action. Numerical and narrative criteria to protect existing uses will be maintained. A Tier 2 review has preliminarily determined that no significant degradation of water quality is expected in Rose Branch and Lake Palestine, which have been identified as having high aquatic life use. Existing uses will be maintained and protected. The preliminary determination can be reexamined and may be modified if new information is received.

The draft permit authorizes discharges subject to the effluent limitations contained in the permit. The daily average flow of effluent shall not exceed 0.20 million gallons per day (MGD); nor shall the average discharge during any two-hour period (2-hour peak) exceed 333 gallons per minute (gpm). The discharge limitations for each effluent characteristic are as follows:

Effluent Characteristic	Discharge Limitations			
	Daily Avg mg/l (lbs/day)	7-day Avg mg/l	Daily Max mg/l	Single Grab mg/l
Flow, MGD	Report	N/A	Report	N/A
Carbonaceous Biochemical Oxygen Demand (5-day)	10 (17)	15	25	35
Total Suspended Solids	15 (25)	25	40	60
Ammonia Nitrogen	3 (5.0)	6	10	15
<i>E. Coli</i> , CFU or MPN/100 ml	126	N/A	N/A	399

The effluent shall contain a chlorine residual of at least 1.0 mg/l and shall not exceed a chlorine residual of 4.0 mg/l after a detention time of at least 20 minutes (based on peak flow), and shall be monitored five times per week by grab sample. An equivalent method of disinfection may be substituted only with prior approval of the Executive Director. The pH shall not be less than 6.0 standard units nor greater than 9.0 standard units and shall be monitored once per month by grab sample. There shall be no discharge of floating solids or visible foam in effluent other than trace amounts and no discharge of visible oil. Effluent monitoring samples shall be taken at the location following the final treatment unit. The effluent shall contain minimum dissolved oxygen of 4.0 mg/l and shall be monitored once per week by grab sample.

**b. Procedural Background**

TCEQ received this application on January 3, 2013. On February 19, 2013, the Executive Director (ED) declared the application administratively complete. The Notice of Receipt of Application and Intent to Obtain a Water Quality Permit (NORI) was published on March 14, 2013 in the *Tyler Morning Telegraph* and on March 20, 2013 in *La Opinion*. Following a technical review of the application, the ED prepared a draft permit. The ED issued the Notice of Application and Preliminary Decision for a Water Quality Permit (NAPD) on June 27, 2013 and it was published on July 21, 2013 in the *Tyler Morning Telegraph* and on July 24, 2013 in *La Opinion*. The public comment period ended on August 23, 2013. On October 28, 2013, the ED filed his decision and Response to Public Comment, which the Office of Chief Clerk mailed on October 30, 2013.

TCEQ received timely comments and requests for a contested case hearing from Joe Freeland on behalf of the City of Tyler and Brad Castleberry on behalf of the Upper Neches River Municipal Water Authority. OPIC recommends granting the hearing requests submitted by the City of the Tyler and the Upper Neches River Municipal Water Authority.

## **II. APPLICABLE LAW**

A person may request that the Commission reconsider the Executive Director's decision or hold a contested case hearing. TEXAS WATER CODE § 5.556. The commission may not grant a request for a contested case hearing unless the Commission determines that the request was filed by an affected person as defined by Section 5.115. TEXAS WATER CODE § 5.556(c). The commission may not refer an issue to the State Office of Administrative Hearings for a hearing unless the Commission determines that the issue involves a disputed question of fact, was raised during the public comment period and is relevant and material to the decision on the application.

A hearing request must substantially comply with the following: give the name, address, and daytime telephone number of the person who files the request; identify the person's personal justiciable interest affected by the application, including a brief, but specific, written statement explaining in plain language the requestor's location and distance relative to the activity that is the subject of the application and how and why the requestor believes he or she will be affected by the activity in a manner not common to members of the general public; request a contested case hearing; and provide any other information specified in the public notice of application. 30 TEX. ADMIN. CODE § 55.201(d).

An “affected person” means a person who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application. TEXAS WATER CODE § 5.115(a); 30 TEX. ADMIN. CODE § 55.203(a). An interest common to members of the general public does not qualify as a personal justiciable interest. *Id.* Governmental entities, including local governments and public agencies, with authority under state law over issues raised by the application may be considered affected persons. 30 TEX. ADMIN. CODE § 55.203(b). In determining whether a person is an affected person, all factors shall be considered, including, but not limited to, the following:

- (1) whether the interest claimed is one protected by the law under which the application will be considered;
- (2) distance restrictions or other limitations imposed by law on the affected interest;
- (3) whether a reasonable relationship exists between the interest claimed and the activity regulated;
- (4) likely impact of the regulated activity on the health and safety of the person, and on the use of property of the person;
- (5) likely impact of the regulated activity on use of the impacted natural resource by the person; and
- (6) for governmental entities, their statutory authority over or interest in the issues relevant to the application.

30 TEX. ADMIN. CODE § 55.203(c).

The Commission shall grant an affected person’s timely filed hearing request if the request is made pursuant to a right to hearing authorized by law and the request raises disputed issues of fact that were raised during the comment period and that are relevant and material to the Commission’s decision on the application. 30 TEX. ADMIN. CODE § 55.211(c). Responses to hearing requests must specifically address:

- (1) whether the requestor is an affected person;
- (2) which issues raised in the hearing request are disputed;
- (3) whether the dispute involves questions of fact or of law;
- (4) whether the issues were raised during the public comment period;

- (5) whether the hearing request is based on issues raised solely in a public comment withdrawn by the commenter in writing by filing a withdrawal letter with the chief clerk prior to the filing of the Executive Director's Response to Comment;
- (6) whether the issues are relevant and material to the decision on the application; and
- (7) a maximum expected duration for the contested case hearing.

30 TEX. ADMIN. CODE § 55.209(e).

### **III. DISCUSSION**

#### **a. Determination of Affected Person Status**

##### *City of Tyler*

According to the hearing request, the City of Tyler is a municipality located in Smith County whose major source of drinking water is situated near the location of the proposed discharge of effluent by the facility. The City of Tyler obtains a significant portion of its municipal water supply from Lake Palestine and raises concerns over the adverse impact the proposed change in the method of effluent disposal will have on its municipal water supply. Specifically, the City of Tyler has concerns about the permitted discharges' effect on dissolved oxygen, pH and nutrients in Lake Palestine. Secondly, the City of Tyler disputes the ED's conclusions that the permitted discharge will not exacerbate existing taste and odor issues related to water diverted from Lake Palestine. Additionally, the City of Tyler expresses concerns that the proposed flow rates in the permit are inadequate to handle the level of demand. Finally, the City of Tyler believes the draft permit lacks sufficient provisions to adequately ensure compliance based on the applicant's compliance history. Since Lake Palestine is a significant source of public drinking water for the City of Tyler, the City of Tyler has a unique interest in the issue of water quality, and water quality is an issue which is relevant to this application. Furthermore, Texas Health and Safety Code Section 121.003(a) provides that a

municipality may enforce any law that is reasonably necessary to protect public health. In addition, Texas Water Code, Subchapter E details the statutory authority a local has over water quality issues.

Therefore, OPIC finds that the City of Tyler is an affected person based on the factors set forth in 30 TEX. ADMIN. CODE § 55.203(c) and that a reasonable relationship exists between the City of Tyler's concerns and the proposed change in the method of effluent disposal.

Upper Neches River Municipal Water Authority

According to the hearing request, the Upper Neches River Municipal Water Authority is a conservation and reclamation district pursuant to Texas Constitution, Article XVI, Section 59. Upper Neches River Municipal Water Authority was created with the power to store, control, conserve, protect, distribute, and utilize storm and floodwaters and unappropriated flow of the Neches River and its tributaries as are located within all of Anderson, Cherokee, Henderson, and Smith Counties. Upper Neches River Municipal Water Authority is the owner and operator of Lake Palestine, authorized by Certificate of Adjudication No. 06-3254. Upper Neches River Municipal Water Authority relies on water supplies in the Neches River basin to meet the municipal and industrial water needs of its customers.

The Upper Neches River Municipal Water Authority raises concerns over the adverse impact the proposed change in the method of effluent disposal will have on Lake Palestine. The Upper Neches River Municipal Water Authority opposes the issuance of the permit on the basis of water quality concerns and regionalization. State policy is to encourage and promote the development and use of regional and area-wide waste

collection, treatment, and disposal systems to prevent pollution and maintain and enhance the quality of state water. TEX. WATER CODE § 26.081(a). When considering the issuance of a permit to discharge waste, the TCEQ is required to consider need and the availability of existing or proposed regional waste collection, treatment, and disposal systems. As the owner and operator of Lake Palestine, the Upper Neches River Municipal Water Authority has a unique interest in the issues of water quality and regionalization, both of which are issues relevant to this application.

Therefore, OPIC finds that the Upper Neches River Municipal Water Authority is an affected person based on the factors set forth in 30 TEX. ADMIN. CODE § 55.203(c) and that a reasonable relationship exists between the Upper Neches River Municipal Water Authority's concerns and the proposed change in the method of effluent disposal.

**b. Issues Raised in the Hearing Request**

The following issues have been raised in the hearing request:

- (1) Whether the proposed change in the method of effluent disposal will adversely impact the quality of the water in Lake Palestine.
- (2) Whether the proposed change in the method of effluent disposal will exacerbate existing taste and odor issues related to public drinking water diverted from Lake Palestine.
- (3) Whether the permitted flow rates and treatment capacity are appropriate given the expected level of demand on the plant
- (4) Whether the draft permit contains sufficient provisions to adequately ensure compliance with applicable regulations and permit provisions given the applicant's compliance history.

(5) Whether the facility will violate TCEQ's regionalization policy.

**c. Issues Raised During the Public Comment Period**

All of the issues raised in the hearing request were raised in the comment period and have not been withdrawn. 30 TEX. ADMIN. CODE §§ 55.201(c), (d)(4), 55.211(c)(2)(A).

**d. Disputed Issues**

There is no agreement between the hearing requests and the ED on the issues raised in the hearing requests.

**e. Issues of Fact**

If the Commission considers an issue to be one of fact, rather than one of law or policy, it is appropriate for referral to hearing if it meets all other applicable requirements. 30 TEX. ADMIN. CODE § 55.211(c)(2)(A). All of the issues presented are issues of fact appropriate for referral to SOAH.

**f. Relevant and Material Issues to the Decision on the Application**

The hearing requests raise issues relevant and material to the Commission's decision under the requirements of 30 TEX. ADMIN. CODE §§ 55.201(d)(4) and 55.211(c)(2)(A). In order to refer an issue to SOAH, the Commission must find that the issue is relevant and material to the Commission's decision to issue or deny this permit. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248–51 (1986) (in discussing the standards applicable to review motions for summary judgment the Court stated “[a]s to materiality, the substantive law will identify which facts are materials . . . it is the substantive law's identification of which facts are critical and which facts are irrelevant

that governs"). Relevant and material issues are those governed by the substantive law under which this permit is to be issued. *Id.*

TCEQ is responsible for the protection of water quality under Chapter 26 of the TEX. WATER CODE and 30 TEX. ADMIN. CODE Chapters 305, 307, and 309, as well as under specific rules related to wastewater systems found at 30 TEX. ADMIN. CODE Chapter 30 and 217. The Texas Surface Water Quality Standards in 30 TEX. ADMIN. CODE Chapter 307 require the proposed permit "maintain the quality of water in the state consistent with public health and enjoyment." 30 TEX. ADMIN. CODE § 307.1. Therefore, issue No. 1 related to adverse impacts on the quality of water in Lake Palestine is relevant and material.

Pursuant to 30 TEX. ADMIN. CODE § 309.3, discharges within five miles of the conservation pool level of a reservoir that may be a source for public drinking water supply shall achieve, at a minimum, enhanced secondary treatment as defined in 30 TEX. ADMIN. CODE § 309.4. We conclude, therefore, that issue No. 2 related to taste and odor issues with public drinking water that is sourced from Lake Palestine is relevant and material.

TCEQ rules require that the plans and specifications for a treatment facility must be based on a design that will produce effluent that will at least meet the requirements and effluent limits in the associated waste water permit. 30 TEX. ADMIN. CODE § 217.6. We conclude, therefore, that issue No. 3 related to permitted flow rates and treatment capacity is relevant and material.

Under TEX. WATER CODE § 26.0281, the Commission must consider an applicant's compliance history when considering whether to issue or amend a permit to

discharge effluent comprised primarily of sewage or municipal waste. Therefore, issue No. 4 related to whether the draft permit contains sufficient provisions given the applicant's compliance history is relevant and material.

Finally, TCEQ adheres to a regionalization policy, as expressed in TEX. WATER CODE § 26.003, 26.0282, 26.081 and 30 TEX. ADMIN. CODE § 307.1. We conclude, therefore, that issue No. 5 related to regionalization is relevant and material.

**g. Issues Recommended for Referral**

OPIC recommends that the following disputed issues of fact be referred to SOAH for a contested case hearing:

- (1) Whether the proposed change in the method of effluent disposal will adversely impact the quality of the water in Lake Palestine.
- (2) Whether the proposed change in the method of effluent disposal will exacerbate existing taste and odor issues related to public drinking water diverted from Lake Palestine.
- (3) Whether the permitted flow rates and treatment capacity are appropriate given the expected level of demand on the plant
- (4) Whether the draft permit contains sufficient provisions to adequately ensure compliance with applicable regulations and permit provisions given the applicant's compliance history.
- (5) Whether the facility will violate TCEQ's regionalization policy.

**h. Maximum Expected Duration for the Contested Case Hearing.**

Commission Rule 30 TEX. ADMIN. CODE § 50.115(d) requires that any Commission order referring a case to SOAH specify the maximum expected duration of

the hearing by stating a date by which the judge is expected to issue a proposal for decision. The rule further provides that no hearing shall be longer than one year from the first day of the preliminary hearing to the date the proposal for decision is issued. To assist the Commission in setting a date by which the judge is expected to issue a proposal for decision, and as required by 30 TEX. ADMIN. CODE § 209(d)(7), OPIC estimates that the maximum expected duration of a hearing on this application would be nine months from the first date of the preliminary hearing until the proposal for decision is issued.

#### IV. CONCLUSION

OPIC recommends granting the hearing requests from City of Tyler and Upper Neches River Municipal Water Authority, on the issues referenced in Section III.g above. OPIC further recommends a hearing duration of nine months.

Respectfully submitted,

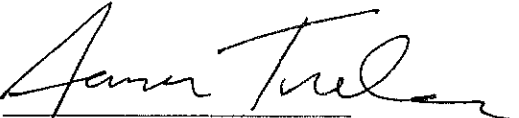
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By: 

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**CERTIFICATE OF SERVICE**

I hereby certify that on March 3, 2014 the original and seven true and correct copies of the Office of the Public Interest Counsel's Response to Requests for Hearing were filed with the Chief Clerk of the TCEQ and a copy was served to all persons listed on the attached mailing list via hand delivery, facsimile transmission, Inter-Agency Mail or by deposit in the U.S. Mail.

  
\_\_\_\_\_  
Aaron B. Tucker

1. The first part of the document is a letter from the  
author to the editor of the journal. The letter is dated  
1964 and is addressed to the editor of the journal.  
The letter is signed by the author and is dated 1964.

2. The second part of the document is a letter from the  
editor of the journal to the author. The letter is dated  
1964 and is addressed to the author. The letter is signed  
by the editor and is dated 1964.

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**TCEQ DOCKET NO. 2013-2138-MWD**

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